Office-Supreme Court, U.S.
FILED
APR 14 1965
JOHN F. DAVIS, CLERK

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1965

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, METRO-GOLDWYN-MAYER, INC. (formerly LOEW'S, INC.), TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANCIS T. ANDERSON,
Attorney for Petitioner

314 Shadeland Ave.
Drexel Hill, Pa. 19026

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

TABLE OF CONTENTS

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Argument	8
Reasons relied on for allowance of the writ	8
I. The Judgment entered in the Lawlor Case is not binding on Petitioner because Petitioner was not a Party in that Case	8
II. The Lawlor Case adjudicated only that the Plaintiffs therein had failed to prove the Fact of Loss, or Injury to their Business or Property, and not that the Plaintiffs had failed to prove a Conspiracy to violate the antitrust Laws	9
A. Analysis of the Lawlor Findings of Fact	10
III. The Judgments of the Court below distort the Law of Judgments beneficially to practiced Monopolists, and therefore in the Public Interest the Judgments should be reversed in order that the Merits of this treble-damage antitrust suit may be heard and determined by a Jury	15
Conclusion	21
Appendix A—Opinion of the District Court	22
Appendix B—Opinion of the District Court and Order Denying Motion for Reconsideration	26

TABLE OF CONTENTS—*Continued*

Page

Appendix C—Opinion of the Court of Appeals for the Fifth Circuit 28

Appendix D—Judgment of the Court of Appeals for the Fifth Circuit 29

Appendix E—Opinion of the District Court in re National Screen Service Corp. 30

TABLE OF CASES CITED

Interstate Circuit v. United States, 306 U. S. 226 (1939) 12

Lawlor v. National Screen Service, 211 F. 2d 934 (Cir. 3, 1954) 16

Lawlor v. National Screen Service, 349 U. S. 322 (1955) 5, 8, 17

Lawlor v. National Screen Service, 352 U. S. 992 (1957) 21

Lawlor v. National Screen Service Corp. 270 F. 2d 146 (3 Cir. 1959) 9

Matter of N. Y. State L. R. Bd. v. Holland, 294 N. Y. 480 (1945) 8, 16

National Screen Service v. Poster Exchange, Inc., 305 F. 2d 647 (5 Cir. 1962) 20

Postal Tel-Cable Co. v. Newport, 247 U. S. 464 (1918) 8

United States v. National Screen Service, et al., Civ. Action No. 75-138 S. D. N. Y. (1957) 18

United States v. Paramount Pictures, 334 U. S. 131 (1948) 21

Vogelstein v. National Screen Service, 204 F. Supp. 591 (1962) 15

TABLE OF STATUTES CITED

Page

Act of Congress approved July 2, 1890, c.647 §§1, 2, 26 Stat. 209 (Sherman Act) 3, 19

Act of Congress approved October 15, 1914, c.323, 38 Stat. 730 (Clayton Act) 3, 4

IN THE

Supreme Court of the United States

October Term, 1965

No.

THE POSTER EXCHANGE, INC.,
Petitioner

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, METRO-GOLDWYN-MAYER, INC. (formerly LOEW'S, INC.), TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Poster Exchange, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 22, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court, dated July 2, 1963 (R.90) is unreported, but is reproduced in Appendix A, *infra* 22. The District Court's opinion denying petitioner's motion for reconsideration, dated August 30, 1963 (R.97) is reproduced in Appendix B, *infra* 26. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 340 F. 2d 320, and is reproduced in Appendix C, *infra* 28; and the judgment entered by the Court of Appeals is reproduced in Appendix D, *infra* 29.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (R.177) was entered on January 22, 1965, and the filing date of this petition is less than ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a plaintiff in a private treble-damage antitrust suit can be barred by a judgment that was entered in another suit involving a different and wholly unrelated plaintiff.

2. If the judgment in the earlier suit was entered solely on the ground that the plaintiff had failed to prove the fact of loss, can the judgment be used in a later suit as an adjudication that the defendants had not conspired to violate the federal antitrust laws?

STATUTES INVOLVED

This case is based on §§1 and 2 of the Act of Congress of July 2, 1890, c.647, 26 Stat. 209 (15 U.S.C. §§ 1 and 2) entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, and on §4 of the Act of Congress of October 15, 1914, c.323, 38 Stat. 730 (15 U.S.C. §15) entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act.

Section 1 of the Sherman Act, *supra*, (15 U.S.C. §1) provides, in pertinent part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal . . ."

Section 2 of the Sherman Act, *supra*, (15 U.S.C. §2) provides as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, *supra*, (15 U.S.C. §15) provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defend-

ant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

Federal Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the provisions of §4 of the Act of the Congress known as the Clayton Act, *supra*, (15 U.S.C. §15).

Description of the Parties

Petitioner (plaintiff-appellant below) is a corporation engaged in the business of servicing motion picture exhibitors with supplies of advertising posters, known as "standard accessories", in the motion picture district of Atlanta, Georgia, which covers parts of four southern states.

National Screen Service Corporation (hereinafter "National Screen"), which is one of the defendants named in the complaint, is engaged in the same business as petitioner, but on a national scale, and it competes with petitioner in the Atlanta area.

The respondents are five major motion picture distributors who produce the accessories that petitioner and National Screen distribute.

History of the Case

Petitioner's amended complaint (R.35) charges respondents and National Screen with conspiring to monopolize the business of distributing standard accessories on a national scale. The facts averred may be briefly summarized as follows (R.35, *et seq.*):

When petitioner began doing business, in 1941, it was able to buy, and did buy, ample supplies of standard acces-

sories directly from the respondents; during the 1940's each respondent gave to National Screen an exclusive license to obtain and distribute standard accessories anywhere in the United States; after these exclusive licenses were granted, it became necessary for petitioner to obtain its supplies from National Screen or to go out of business; for several years National Screen made some supplies available to petitioner, but the quantity was inadequate and the price too high; on February 15, 1961, National Screen notified petitioner—and all others in like position—that after May 16, 1961, no more supplies would be made available; the said exclusive license agreements contained profit-sharing provisions, and National Screen's decision to cut off supplies was made with the approval of respondents; petitioner has been injured and damaged in the amount of $100,000.00, and unless respondents are restrained from continuing to conspire petitioner will have to go out of business because of lack of supplies of stock in trade (Amended Complaint, R.35[1]).

It is not contended that these averments, taken at face value, do not allege a cause of action under sections 1 and 2 of the Sherman Act.

The respondents, however, (but not the defendant National Screen) jointly filed in the District Court a motion for summary judgment (R.81) based on grounds *not* including res judicata, whereupon the District Court (Morgan, J.) ignoring all the grounds formally alleged,[2] granted the motion, and entered summary judgment for respondents, on the basis of res judicata, but without referring to the doctrine of res judicata by name.

---

[1] Additional facts are stated in "Plaintiff's Pre-Trial Statement," Supp. R.1 through 36; and a summary of the main facts appears in the Court's opinion in *Lawlor v. National Screen Service*, 349 U.S. 322 (1955).

[2] Since the court ignored these grounds, and since petitioner also regards them as devoid of merit, no further reference will be made to them in this petition, but if respondents attempt to rely upon them, petitioner will ask leave to submit a reply brief.

Specifically, the District Court, in its opinion, said (R. 90, Appendix A, *infra* 22):

"Substantially the same charge as is here made was made in the case of *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, cert. den. 362 U.S. 922, in which the instant defendants, United Artists Corporation and Paramount Film Distributing Corporation, were also defendants. It seems to this Court that this *Lawlor* case is particularly significant in that the Third Circuit reviewed the historical origin of the motion picture distributor's relationship with National Screen and found absolutely no evidence of conspiracy. . . .

"Also strongly significant, in that it constitutes persuasive authority in this case, is the decision rendered by Judge Luongo in *Vogelstein v. National Screen Service Corporation*, 204 F. Supp. 591, in which the Court granted a summary judgment to the defendants sued therein in an action substantially similar to the case at bar. Because of a stipulation between the parties that any decision in *Lawlor* as to the existence of a conspiracy or monopoly would be dispositive of the conspiracy and monopoly questions in the other cases, the earlier claim by Vogelstein had been dismissed. . . . The defendant's motion for summary judgment was granted, with Judge Luongo, in the Vogelstein case, making the following statements concerning the *Lawlor* case:

> 'It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those

> issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer.'
>
> "Therefore, it seems to be clear to this Court that the *Lawlor* findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope."

Accordingly, the District Court, on December 10, 1963, entered a final appealable judgment (R.98) which, on January 22, 1965, was affirmed in a per curiam opinion by the United States Court of Appeals for the Fifth Circuit (R.175, Appendix C, *infra* 28), and judgment was entered on the same day [3] (R.177, Appendix D, *infra* 29).

---

[3] In the meantime, viz, on January 31, 1964, National Screen also filed a motion for summary judgment, and on February 24, 1965, the District Court granted this motion and entered judgment for National Screen. The District Court's opinion is reproduced in Appendix E, *infra* 30. On March 15, 1965, petitioner appealed from the entry of this judgment to the United States Court of Appeals for the Fifth Circuit, and that appeal is now pending.

ARGUMENT

Reasons Relied on for Allowance of the Writ

I. THE JUDGMENT ENTERED IN THE LAWLOR CASE IS NOT BINDING ON PETITIONER BECAUSE PETITIONER WAS NOT A PARTY IN THAT CASE.

Petitioner had no connection with the *Lawlor* case, and therefore the judgment entered in that case cannot be used to prevent petitioner from obtaining a hearing on the merits of its case: *Postal Tel-Cable Co. v. Newport*, 247 U.S. 464 (1918); *Matter of N.Y. State L.R. Bd. v. Holland*, 294 N.Y. 480 (1945).

Thus, in *Postal Tel-Cable Co. v. Newport, supra* (247 U.S. at page 467), the Court said:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction (citing cases). The opportunity to be heard is an essential requisite of due process of law in judicial proceedings (citing cases). And as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (citing cases) so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

And in *Matter of N.Y. State L.R. Bd. v. Holland, supra* (294 N.Y., at pages 493-4), the court said:

> "The fundamental principle governing the general doctrine of res judicata is that a party shall not be heard a second time on an issue which he has once been called upon and permitted to try and contest. . . . It is . . . a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger. . . . every person is entitled to contest once an issue of fact or of law which affects his rights. A decision on such issues in favor of a party cannot relieve him from the burden of proving the facts again and of again convincing the court of the soundness of his position when that position is challenged by a stranger to the original contest."

The aforementioned views of the District Court are manifestly irreconcilable with these basic authorities.

II. The Lawlor Case adjudicated only that the Plaintiffs therein had failed to prove the Fact of Loss, or Injury to their Business or Property, and not that the Plaintiffs had failed to prove a Conspiracy to violate the Antitrust Laws.

The *Lawlor* case was tried to the court without a jury. The trial judge (Kraft, J.) entered 140 findings of fact and 12 conclusions of law (R.115), but wrote no opinion. No finding dealt specifically with the issue of conspiracy or monopoly but, as will be seen, many of the findings, and conclusions, did deal specifically with failure of proof of the fact of loss.[4]

The closest that the trial judge came to ruling on the

---

[4] The judgment entered by Judge Kraft was affirmed in *Lawlor v. National Screen Service Corp.*, 270 F. 2d 146 (3 Cir. 1959). The opinion of the Court of Appeals contains many statements of fact and conclusions of law which are totally unjustified by anything contained in the trial judge's findings and conclusions. All of the material findings, favoring either side, are referred to in this petition.

issues of conspiracy and monopoly appears in his conclusions of law 3, 4, 5 and 6 which are quoted below (R.170):

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act."
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."
>
> "5. The plaintiffs are not persons injured in their business or property within the meaning of Section 4 of the Clayton Act by reason of any action or conduct of any of the defendants."
>
> "6. The plaintiffs failed to show any damage sustained by them as a result of any action or conduct of any of the defendants."

None of the *findings* dealt expressly with the issues of monopoly or conspiracy, but a few of them may be thought to deal with those issues by inference. In the following analysis, therefore, all of the relevant and material findings are referred to.

A. *Analysis of the Lawlor Findings of Fact.*

(1)

The court found that at various times from 1940 to 1947 National Screen obtained from each of the then existing eight major motion picture distributing corporations an "exclusive" license to obtain and distribute the standard accessories produced by it to advertise its pictures (Findings 36, 39, 63, 75, 81, 88, 101 and 107, R.126 *et seq.*)

The dates of execution of these exclusive license agreements are of some significance, and they are therefore listed below in chronological order:

Name of Licensor[5] *(Abbreviated)*	*Effective Date of Contract*	*Finding*
Paramount	Feb. 1, 1940	36
RKO	Feb. 1, 1940	39
MGM	March 1, 1942	63
Universal	Aug. 1, 1944	75
Columbia	May 1, 1945	81
United Artists	March 1, 1946	88
Warner Bros.	April 15, 1946	101
20th Century-Fox	June 30, 1947	107

(2)

The court found that the reason why the film companies granted these licenses was that although it was the practice of the motion picture distributors to require exhibitors to pay a price for standard accessories the revenue received was usually, if not always, much less than the cost of production.[6] (Findings 32, 38, 62, 74, 80, 87, 100 and 106, R. 124, *et seq.*)

(3)

The court found that the reason why the licenses were made "exclusive" was as follows (Finding 35, R.125):

> "35. The opening of new exchanges throughout the country required National Screen to assume leasehold and other obligations and required an investment involving millions of dollars. To protect its investment, National Screen in its negotiations with Paramount

---

[5] All of these licensors are respondents herein except RKO, Universal and Columbia.

[6] The record shows that all of these license agreements contained a provision requiring National Screen to pay a share of its profits to the licensors (R.39; Supp. R.12) and this, of course, had the effect of enabling the licensors to derive a net profit from the business of distributing their own advertising. (See, for example, Finding of Fact 62, R.135.)

Pictures, Inc. required that it be given an exclusive license to produce and distribute Paramount standard accessories for a five year term."

(4)

With respect to the question of collaboration among respondents the court found, with respect to Paramount, for example, as follows (Finding 37, R.126):

> "37. Neil Agnew, who was Vice-President of Paramount Pictures, Inc. in charge of sales, a member of its board of directors, and responsible for the distribution of accessories at the time the Paramount Pictures, Inc. standard accessory contract was entered into recommended the negotiation of that contract and carried on the negotiations for it. Neither Mr. Agnew nor any one under his direction or supervision consulted or conferred with any executives or representatives of any other film producing or distributing company with respect to the question whether the contract should be made. The decision did not depend upon the action of any other company with respect to a similar contract or arrangement. The decision was based solely upon the business interests of Paramount Pictures, Inc."

Substantially the same finding was made with respect to the other seven licensors (Findings 40, 64, 76, 82, 89, 102, and 108, R.128, *et seq.*)

No other findings were made in this connection, and it is quite certain that the findings made are ineffectual insofar as absolving the licensors on the charge of conspiracy is concerned:—*Interstate Circuit v. United States*, 306 U. S. 226 (1939).

(5)

The court found that "During the period of time commencing February 1, 1940 and ending August 1, 1940, Ad-

vertising Accessories Inc., a predecessor corporation of National Screen, acquired by purchase the businesses of twenty-eight poster renters who had been conducting their business in twenty-two different cities of the United States . . . (Finding 42, R.128).[7]

(6)

The court found that following the grant of the third of the said exclusive licenses (that by Loew's, in 1942) Lawlor and his partner brought an antitrust action against Paramount, RKO, Loew's and National Screen, and that, in 1943, that action was settled by an agreement in which National Screen agreed that it would, under a sub-license, provide Lawlor with adequate supplies of the accessories produced by Paramount, RKO, and Loews, and also accessories for the pictures of any other film distributor from whom it might thereafter obtain a similarly exclusive license (Findings 69, 70 and 71, R.137-138).

(7)

The court found that throughout the six year period of time involved in the suit (August 1943 to 1949) National Screen faithfully complied with its sub-license agreement and thus provided Lawlor with full supplies of all the accessories that he said he wanted (Finding 73, R.139).

Specifically, with respect to the accessories of the five film distributors that granted exclusive licenses after the making of the aforesaid sub-license agreement, the court found, for example, in the case of Universal as follows (Finding 79, R.141):

> "79. Upon obtaining the license to produce, by causing to be manufactured, and to distribute standard accessories for motion pictures of Universal Pictures

[7] There is much other evidence on the record tending to show that the combination herein complained of was conceived with the specific intent of eliminating competition: Supp. R.4 through 7, and 25.

Company, Inc., National Screen advised the plaintiffs of the license and of the availability to the plaintiffs of standard accessories produced by National Screen for Universal Pictures, pursuant to the sub-license agreement. The plaintiffs thereupon and during the entire period in suit ordered and received their requirements of Universal standard accessories for National Screen. Thereafter, plaintiffs acquired from National Screen, rather than from the local exchange of Universal Film Exchanges, Inc., all of the plaintiffs' requirements of Universal standard accessories.

Substantially the same finding was made with respect to the accessories of the other four film distributors in this category (Findings 85, 92, 105 and 111, R.141, *et seq.*)

(8)

The court found that National Screen charged Lawlor such low prices that they were actually less than the prices that he had been required to pay the film distributors when he acquired his supplies directly from them (Findings 128, 129, R.165).

(9)

The court found that as a result of the foregoing, Lawlor continuously made more and more money. For example, the court found that (No. 122, R.163):

"122. During the period in suit, i.e., from 1943 to 1949, plaintiffs' business was progressively more successful, with increased volume and profits. The gross income from plaintiffs' business went up regularly year to year from 1943 to 1949, and, in fact, plaintiffs' gross doubled during this period. The profits of plaintiffs' business also increased each year between 1943 and 1949."

(10)

The court specifically found that Lawlor had suffered no loss at any time during the period in suit. This mani-

festly important finding is quoted below in full (No. 138, R.169):

> "138. From 1943 to 1949, the period in suit, the plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiffs."

In contrast with the foregoing, the record in this case shows that National Screen never granted petitioner's requests for a sub-license (Supp. R.16) and has at all times determined "the quantity of said accessories available to . . . petitioner, and the prices to be charged . . ." (R.23), and that "The Poster Exchange Inc. has always paid National Screen top prices." (R.23), with the result that petitioner has suffered damage and injury in the estimated amount of $100,000.00 (R.46).

It is clear, therefore, that petitioner has been most unjustifiably wronged by the ruling that it is barred by the judgment entered in the *Lawlor* case from obtaining a hearing, by court and jury, on the merits of its own case.

III. The Judgments of the Courts below distort the Law of Judgments beneficially to practiced Monopolists, and therefore in the Public Interest the Judgments should be reversed in order that the Merits of this treble-damage antitrust Suit may be heard and determined by a Jury.

More important than the injustice done the petitioner, however, is the fact that the judgments of the courts below are based on a concept of the law of judgments which is most revolutionary and undesirable.

As has been seen, the district judge (Morgan J.) after quoting from the opinion filed by the district judge in the *Vogelstein* case, (*Vogelstein v. National Screen Service*, 204 F. Supp. 591 (1962)) concluded that (R.93, Appendix A, *infra* 24):

> "Therefore, it seems to be clear to this Court that the *Lawlor* findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope."

If that statement of the law is allowed to stand it will, of course, result in the obliteration of the fundamental rule that the res judicata effect of a judgment binds no one other than the parties to the suit in which the judgment is entered.

If the statement stands, all that a national monopolist need do is to get a single district court judge to decide a single case in his favor and he will be well along on the road to being able to operate his nefarious practices without fear of being interfered with by a judgment of any other court anywhere in the nation.

For it must be remembered that the principle of res judicata provides support for bad judgments as well as good ones. As stated by Lehman, C.J., in *Matter of N. Y. State L. R. Bd. v. Holland, supra*, 294 N. Y. 480, 493 (1945):

> "It has been said that within the field in which the principle is applied it 'renders white that which is black, and straight that which is crooked. Facit excurro rectum, ex albo nigrum. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy' Jeter v. Hewitt et al., 22 How. U. S. 352, 364, 16 L.ed. 345."

And it can be asserted on the basis of the highest authority that those who are disposed to violate the federal antitrust laws are very adept in distorting them, and in misleading at least some judges to acquiesce in the distortions.

For instance, in 1955 these same respondents, in a case involving this same conspiracy, succeeded in obtaining a holding by a court of appeals[8] that the res judicata effect of a judgment in their favor extends even to a *consent* judg-

[8] *Lawlor v. National Screen Service*, 211 F. 2d 934 (Cir. 3, 1954).

ment, entered without findings, and involving a period of time different from that involved in the later suit. This ruling, however, was reversed by this Court and in the course of reversing it this Court said (*Lawlor v. National Screen Service, supra*, 349 U. S. 322 (1955)):

> "We granted certiorari because of the importance of the question thus presented in the enforcement of the federal antitrust laws (349 U. S. at 326)
>
> * * * * *
>
> "There is no merit . . . in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata" (349 U. S. at 329).

It is self-evident that in the present instance these same respondents are bent upon obtaining for themselves even a much greater immunity from civil liability for future violations. As has been seen, respondents are charged with operating a conspiracy national in scope, and adversely affecting many persons. There has been only one trial on the merits, the *Lawlor* trial, which was to a judge without a jury, and which turned on the finding that the plaintiff therein failed to prove damage or injury to his business. Now respondents are attempting to use the judgment entered in that case as a bar against all others seeking relief, whether or not injured in their business. The question is whether the respondents will prove to be ingenious enough to succeed in carrying out so ambitious a program. Up to now they have indeed succeeded, and only by intervention of this Court can they be stopped.

More fully, up to now the respondents have succeeded in bringing about the following described twistings or evasions of the antitrust laws in furtherance of the instant conspiracy.

First, reference is made to the case of *United States v. National Screen Service, et al.*, Civil Action No. 75-138 S. D. N. Y. (1957). In that case the Government sued to break up the conspiracy and monopoly involved in the instant case, and the Complaint[9] filed by the Government was very full and complete, and called loudly for the entry of a strong decree. Unfortunately, however, the respondents were able to induce the Government's representatives to agree to the entry of a consent decree the terms of which were far too weak to do any good. Specifically, the decree purported to outlaw the practice of making exclusive license agreements, and the respondents were ordered to grant a distribution license to any qualified applicant. On the face of it that seemed to be helpful, but when it came time to define the word "qualified" the decree provided, in section V (B) that (R.19):

> "No Producer Defendant shall be required to regard any person as a qualified applicant . . . unless (1) The applicant . . . has a national distribution organization and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service . . ."

As beforesaid (*Supra* 11) in *Lawlor* the court found that the reason why National Screen asked for and got exclusive license privileges was that National Screen was obliged to expend "millions of dollars" in setting up its national distribution organization (Findings 34, 35, R.125).

Since respondents are now prohibited from granting any more exclusive licenses, it seems certain that no new-

[9] Supp. R.28, *et seq.*

comer millionaire [10] would be inclined to consider investing his millions in the setting up of a national distribution organization to compete against National Screen's long entrenched monopolistic position.

The net effect of the consent decree therefore, was to make more secure the position of the conspirators. Indeed, the record shows that National Screen and the respondents actually have been so bold as to use the decree in the courts as a document officially justifying and validating the national monopoly that they are now so boldly operating. As has been seen, the conspirators got out of the 1942 suit by their agreement that National Screen would sell supplies to its competitors, but there was nothing in the consent decree to compel National Screen to continue to do this. Realizing this, National Screen has served notice that it will sell no more supplies to competitiors, and has advanced the consent decree as authority for its position (R.50, bottom to R.53, bottom), and the complaint alleges that this action was taken "with knowledge, acquiescence and approval on the part of the respondents" (R.42-3).

Secondly, the pre-history of this case also demonstrates the extraordinary degree to which respondents have twisted and distorted the antitrust laws.

This case was commenced in 1961 against National Screen alone on the theory of a violation of section 2 of the Sherman Act (R.1). National Screen moved for summary judgment on the basis of the consent decree, and on the *Lawlor* third conclusion of law, which, to repeat, was as follows (R.170):

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act."

---

[10] Needless to say, there is nothing on this record tending to show that petitioner possesses any such amount of wealth, or that anyone has applied for a license to compete.

The district judge (Morgan, J.) denied the motion and on appeal the judgment was affirmed: *National Screen Service v. Poster Exchange, Inc.*, 305 F. 2d 647 (Cir. 5, 1962).

In its opinion, the Court of Appeals paid scant attention to the consent decree, and, more importantly, concluded that *Lawlor* was irrelevant for reasons expressed as follows:

> "... Attached to one of the affidavits of National Screen are a total of 140 findings of fact and 12 conclusions of law by Judge C. William Kraft, Jr.... National Screen insists that such findings and conclusions ... are completely controlling in the instant case. Such findings and conclusions are noteworthy. The court found that the plaintiffs in that case failed to submit evidence that National Screen ... failed to fulfill plaintiff's requirements and requests for such accessories ... and that the plaintiffs suffered no damage or injury to their business or property as a result of any action on the part of National Screen. The District Court concluded as a matter of law that National Screen did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act; that the plaintiffs were not persons injured in their business or property within the meaning of Section 4 of the Clayton Act, 15 U.S.C.A., Section 15, by reason of any action or conduct of any of the defendants; that the plaintiffs failed to show any damage sustained by them as a result of any action on conduct of any of the defendants ..." 305 F. at pages 562-563).
>
> "The facts and the period of time involved in the Lawlor case are substantially different from those under consideration in the instant case." (305 F. 2d at page 654)

Accordingly, the Court of Appeals returned the case to the District Court for trial on the merits.

It was at this point that petitioner filed its amended complaint for the purpose of adding the charge of conspiracy, and now, as has been seen, the whole case stands dismissed because, as the district judge said (R.93, Appendix A, *infra* 24):

> "... the *Lawlor findings* as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nation wide in scope."

And the Court of Appeals has given its affirmation with only a pro forma, per curiam opinion.

It is believed that if any other group of monopolists has ever heretofore been able so to encroach on the vitals of the antitrust laws there is no record of it.[11]

CONCLUSION

For the foregoing reasons the prayer of this petition for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

FRANCIS T. ANDERSON
Attorney for Petitioner

---

[11] Among other decisions exemplifying the need for guarding the antitrust laws against the machinations of the respondents in this case are *Lawlor v. National Screen Service*, 352 U.S. 992 (1957) and *United States v. Paramount Pictures*, 334 U.S. 131, 163-164 (1948). In the latter case, this Court, referring to respondents in connection with another, but comparable, conspiracy, observed that (334 U.S. at 163-64):

> ". . . delegation of the management of . . . [a] system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals could be done only with the greatest reluctance."

Appendix A

OPINION OF THE DISTRICT COURT

(Filed: July 2, 1963)

On June 7, 1963, the motion picture distributor defendants, Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, and Warner Bros. Pictures Distributing Corporation, joining together for the purpose of a motion, filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, asking that this Court dismiss the action instituted by the plaintiff under Sections 1 and 2 of the Sherman Act (15 U.S.C., Secs. 1 and 2) on the ground that there is no genuine issue as to any material fact, and that these defendants are entitled to a judgment in their favor as a matter of law.

The movants in this case hold copyrights in respect to motion pictures produced and distributed by them and have licensed National Screen to produce and distribute advertising accessories pertaining to those pictures. In the amended complaint filed by the plaintiff some two years after the filing of the original complaint, it is alleged that the movants have conspired with National Screen to monopolize the business of distributing standard motion picture accessories in the United States.

Substantially the same charge as is here made was made in the case of *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, cert. den. 362 U. S. 922, in which the instant defendants, United Artists Corporation and Paramount Film Distributing Corporation, were also defendants. It seems to this Court that this *Lawlor* case is particularly significant in that the Third Circuit reviewed the historical origin of the motion picture distributor's relationship with National Screen and found absolutely no evi-

dence of conspiracy. That opinion states that, commencing around 1939, the motion picture distributors severally determined that it was uneconomic to produce and distribute their own accessories. For that reason, each entered into a separate agreement with National Screen for that purpose. In so doing, each acted individually and without reference to the others. The Court stated, in respect to the relationship between the motion picture producers and National Screen:

> ". . . They [the distributors] contracted with National Screen because no comparable firm was available to undertake the task. The most that can be gleaned from the factual pattern is that the business climate affected each of the film companies in a substantially similar way and they individually decided to extricate themselves from a losing proposition."

Also strongly significant, in that it constitutes persuasive authority in this case, is the decision rendered by Judge Luongo in *Vogelestein v. National Screen Service Corporation*, 204 F. Supp. 591, in which the Court granted a summary judgment to the defendants sued therein in an action substantially similar to the case at bar. Because of a stipulation between the parties that any decision in *Lawlor* as to the existence of a conspiracy or monopoly would be dispositive of the conspiracy and monopoly questions in the other cases, the earlier claim by Vogelstein had been dismissed. Vogelstein, however, filed a further complaint in respect to the period of time subsequent to June 31, 1957, alleging a conspiracy between National Screen and the motion picture distributors, and, by amendment, alleged as a fact indicative of the conspiracy the refusal by National Screen on May 16, 1961, with the knowledge of the motion picture distributors, to deal further with him. The defendant's motion for summary judgment was granted, with Judge Luongo in *Vogelstein v. National Screen Service Corpora*ments concerning the *Lawlor* case:

"It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer."

Therefore, it seems to be clear to this Court that the *Lawlor* findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope.

Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation.

Consequently, it is the belief of this Court that the motion for summary judgment filed by the motion picture distributor defendants should be granted as there appears to be no genuine issue of fact involved herein.

As the motion for summary judgment has been granted, it will be unnecessary for the Court to pass on the requests for admissions and interrogatories heretofore propounded by the plaintiff.

IT IS SO ORDERED.
This the 2nd day of July, 1963.

/s/ LEWIS R. MORGAN
United States District Judge

Appendix B

OPINION OF THE DISTRICT COURT AND ORDER DENYING MOTION FOR RECONSIDERATION

(Filed: August 30, 1963)

On August 9, 1963, the plaintiff in the above-styled case filed a motion for reconsideration and vacation of the decision rendered by this Court on July 2, 1963, contending that, since both this Court and the Court of Appeals have definitively had [sic] that National Screen is not entitled to summary judgment, it necessarily follows that the film companies are not entitled to summary judgment. The plaintiff points out that no court in Philadelphia or elsewhere has ever ruled that the film companies are any less liable than National Screen. They go on to say that from the very nature of a conspiracy case, it is legally and logically impossible for a Court to enter summary judgment in favor of an alleged co-conspirator sufficiently impilcated by the terms of the complaint.

It seems to the Court that the plaintiff's contention that, since National Screen was not granted summary judgment, then the distributor defendatns were not entitled to receive such relief ignores the fact that National Screen is charged with a refusal to deal with the plaintiff, an issue, it seems, wholly unrelated to the plaintiff's charge that the distributor defendants conspired to effect a monopoly to the plaintiff's prejudice and injury. In any case, it is not the pleading but the evidence submitted by way of oral testimony, or in affidavit form, which determines whether or not an issue of fact has been presented. When sufficient credible evidence has not been submitted, then the remedy of summary judgment performs the necessary function to avoid burdening the courts with worthless

litigation. *Creel v. Lone Star Defense Corporation*, 171 F. 2d 964; *Chambers v. Equitable Life Assurance Society*, 224 F. 2d 338.

The Court sees no reason for disturbing its order of July 2, 1963, and hereby denies the plaintiff's motion for reconsideration.

IT IS SO ORDERED.
This the 29th day of August, 1963.

/s/ LEWIS R. MORGAN
United States District Judge

Appendix C

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

(January 22, 1965)

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: This is an appeal from a summary judgment which was entered against plaintiff-appellant in a private antitrust action seeking treble damages for an alleged violation of the Sherman Act. We have carefully reviewed the record and conclude that the trial court committed no error.[1]

The judgment is AFFIRMED.

[1] See Fed. R. Civ. P. 56(e); Dressler v. MV Sandpiper, 331 F. 2d 130 (2 Cir. 1964).

Appendix D

JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia; and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, The Poster Exchange, Inc., be condemened to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 22, 1965

Issued as Mandate: Feb. 16, 1965.

Appendix E

OPINION OF THE DISTRICT COURT IN RE NATIONAL SCREEN SERVICE CORP.

THE POSTER EXCHANGE, INC., *Plaintiff*

vs.

NATIONAL SCREEN SERVICE CORPORATION, *Defendant*

Civil Action No. 7665

On January 22, 1965, the United States Court of Appeals for the Fifth Circuit entered an Order affirming this Court's judgment of December 10, 1963, wherein judgment was entered in favor of Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Incorporated, Twentieth Century Fox Film Corporation, United Artists Corporation and Warner Brothers Picture Distributing Corporation. This judgment resulted from the granting on July 2, 1963, of a motion for summary judgment filed on behalf of these motion picture distributor defendants.

On January 31, 1964, the defendant in this case filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure contending that as a result of the entry of the aforementioned judgment no genuine issue as to any material fact remained, and that therefore the defendant was entitled to judgment as a matter of law. This Court, on February 20, 1964, denied this motion for summary judgment, stating in the opinion that it would be improper to express an opinion as to the legal soundness of the plaintiff's case at a time when an order disposing of one of the principal areas of the plaintiff's suit is on appeal. This situation has now been corrected by the Fifth Circuit's affirming this Court's Order of December 10, 1963. Therefore, the motion for summary judgment will now be considered.

The plaintiff's attorney has repeatedly admitted that he had no case against the defendant herein unless this Court restored the long adjudicated issue of conspiracy, which this Court rejected in its Order granting summary judgment for the defendant on this issue. Thus, it seems to this Court at the present time that there is no triable issue of fact and that only a question of law is presented for determination.

This issue of law has been resolved by other courts in favor of the defendant. *Vogelstein vs. National Screen Service Corporation*, 204 F. Supp. 591, Aff'd. 310 F. 2d 738; *Lawlor vs. National Screen Service Corporation*, 270 F. 2d 146, Cert. Den. 362 U. S. 922.

This Court is in agreement with the findings of the above-cited cases and hereby grants the defendant's motion for summary judgment.

IT IS SO ORDERED.
This the 24th day of February, 1965.

/s/ LEWIS R. MORGAN
United States District Judge